IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Action No. 1:07-cr-00090-WYD

UNITED STATES OF AMERICA,

Plaintiff,

v.

1. B&H MAINTENANCE & CONSTRUCTION, INC., a New Mexico corporation;
2. JON PAUL SMITH a/k/a J.P. SMITH; and
3. LANDON R. MARTIN,

Defendants.

UNITED STATES' REPLY IN SUPPORT OF "UNITED STATES' NOTICE OF INTENT TO USE EVIDENCE OF OTHER CRIMES, WRONGS OR ACTS PURSUANT TO FEDERAL RULE OF EVIDENCE 404(b)" (Docket # 83)

This Reply addresses the issues raised by the Defendants in their Responses[1] to "United States Notice of Intent to use Evidence of Other Crimes, Wrongs or Acts Pursuant to Federal Rule of Evidence 404(b)" (Dkt. # 83), hereinafter "United States' Notice Docket # 83."

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[1] "Defendant J.P. Smith's Response to Government's Notice to use Evidence of Other Crimes, Wrongs or Acts Pursuant to Federal Rule of Evidence 404(b) [Document # 83]" (Docket # 92), hereinafter "Def. Smith Resp. Docket # 92," and "Landon Martin's Response to United States' Notice of Intent to use Evidence of Other Crimes, Wrongs, or Acts Pursuant to Federal Rule of Evidence 404(b) [Docket # 83] and Supplemental Statement in Support of Severance" (Docket # 107), hereinafter "Def. Martin Resp. Docket # 107." Additionally, Defendant B&H Maintenance & Construction, Inc. ("B&H") joined Def. Smith Resp. Docket # 92. *See* Defendant B&H Maintenance & Construction, Inc.'s Joinder in Defendant J.P. Smith's Response to Government's Notice to Use Evidence of Other Crimes, Wrongs or Acts Pursuant to Federal Rule of Evidence 404(b) [Document # 92].

The Notice provided by the United States pursuant to the Court's Order, Docket # 41 ¶ I.B., includes two categories of evidence which are admissible under Federal Rule of Evidence 404(b). The first category of evidence consists of three instances where Defendant Jon Paul Smith ("Smith"), on behalf of Defendant B&H Maintenance & Construction, Inc. ("B&H"), discussed bid information with a competitor prior to the time that bids were submitted and either reached, or attempted to reach, an understanding as to which company's bid would be lower and which company's bid would be higher. On one of these occasions Defendant Smith forwarded the competitor's bid information to Defendant Landon Martin ("Martin"), whose duties included submitting B&H's bids to customers. The second category of evidence is Defendant Smith's false statements made to the FBI Special Agent who interviewed him on January 11, 2006.[2] The United States will not seek to introduce evidence relating to Defendant Martin's silence in the face of Defendant Smith's false statements to the FBI.[3] Therefore, Defendant Martin's supplemental statement with regard to severance,[4] is moot.

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[2] As is discussed in "United States' Reply in Support of "United States' Motion for Pretrial Ruling on Admissibility of Testimony about Defendant Jon Paul Smith's False Statements to the FBI [Docket # 80], filed on November 1, 2007, the false exculpatory statements are also admissible as circumstantial evidence of guilty knowledge and intent.

[3] *See* United States Reply in Support of "United States' Motion for PreTrial Ruling on Admissibility of Testimony about Defendant Jon Paul Smith's False Statements to the FBI [Docket # 80], filed on November 1, 2007.

[4] *See* Def. Martin Resp. Docket # 107, and Landon Martin's Combined: (1) Response to the United States' Motion for Pretrial Ruling on Admissibility of Testimony about Jon Paul Smith's False Statements to the FBI; and (2) Supplemental Statement in Support of Severance Docket # 105. For the reasons stated in the United States' Opposition to "Defendant Landon Martin's Motion for Severance" (Docket # 50) [Docket # 54], Defendant Martin should be tried

The proffered evidence is all relevant to the element of intent to enter into the charged bid rigging conspiracy. It is probative evidence showing intent, knowledge, plan, and absence of mistake or accident. It is not unduly prejudicial, and presentation of the evidence will not add significantly to the length of the trial. The United States will only call two additional witness and introduce two additional documents to establish the evidence related to the incidents. Admission of the proffered evidence is consistent with Tenth Circuit precedent, as well as that of numerous other Federal Courts of Appeals and will assist the jury in properly determining the guilt or innocence of the Defendants.

I. Legal Analysis

A. Federal Rule of Evidence 404(b) is a Rule of Inclusion, not of Exclusion

In accord with Federal Rule of Evidence 404(b), evidence of other crimes, wrongs or acts may not be admitted to prove "the character of a person in order to show action in conformity therewith." Such evidence may be admitted, however, for a number of proper purposes including: "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." *Fed. R. Evid. 404(b).*

In *Huddleston v. United States*, 485 U.S. 681 (1988), the Supreme Court dispelled any notion that trial courts should be overly suspicious of Rule 404(b) evidence or subject the admission of such evidence to special scrutiny not called for by the Federal Rules of Evidence.

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with his coconspirators.

"Congress was not nearly so concerned with the potential prejudicial effect of Rule 404(b) evidence as it was with ensuring that restrictions would not be placed on the admission of such evidence." *Id.* at 688-689. The defendant is protected from unfair prejudice if the evidence is relevant and offered for a proper purpose, if the probative value of the evidence is not substantially outweighed by its potential for unfair prejudice, and if the court, upon request, instructs the jury to consider the evidence only for a proper purpose. *Id.* at 691. The Court held that no preliminary finding need be made that the act has been proven by a preponderance of the evidence before such evidence is submitted to the jury. *Id.* at 682.

In *United States v. Record,* 873 F.2d 1363, 1374 (10th Cir. 1989), the Tenth Circuit, discussed and applied *Huddleston's* four prong guidelines: (1) relevance; (2) proper purpose; (3) probative value not substantially outweighed by the potential for unfair prejudice; and (4) limiting instruction given if requested by the defendant. *See also United States v. Zamora*, 222 F.3d 756, 762 (10th Cir. 2000); *United States v. Mares*, 441 F.3d 1152, 1156 (10th Cir. 2006).

In reviewing and approving the admission of 404(b) evidence in a conspiracy case, the Tenth Circuit in *Record* noted: "We have previously recognized the probative value of uncharged acts evidence to demonstrate motive, intent, knowledge, or plan in the context of a conspiracy prosecution." [citations omitted] *Record*, 873 F.2d at 1375. *See also United States v. Gamble*, 541 F.2d 873,878 (10th Cir. 1976) ("Such evidence is particularly relevant in a conspiracy case.").

B. 404(b) Evidence is Regularly Admitted in Antitrust Cases

Contrary to Defendant Smith's claim[5], intent is always an element of a Sherman Act offense. *United States v. United States Gypsum Co.*, 438 U.S. 422, 435 (1978); *see also United States v. Metro. Enters., Inc.*, 728 F.2d 444, 449-450 (10th Cir. 1984). "A simple plea of not guilty . . . puts the prosecution to its proof as to all elements of the crime charged . . . " *Matthews v. United States*, 485 U.S. 58, 64-65 (1988).

Just as Defendant Smith claims, the defendants in *United States v. Suntar Roofing, Inc.*, 897 F.2d 469, 479 (10th Cir. 1990), claimed that Rule 404(b) similar acts evidence should not have been admitted because: "[A]ppellants' intent was not at issue because they denied that they had committed the acts charged in the indictment." The Tenth Circuit held that the admission of 404(b) evidence was proper, and that:

> [i]ntent to restrain competition . . . is an element of a criminal violation of the Sherman Act. . . . The requisite intent can be proved by showing that the defendants knowingly joined and participated in the conspiracy . . . Thus, the intent of the conspirators was properly at issue during the trial.

Id. at 479-480 [internal citations omitted].

Likewise, courts in other circuits have routinely admitted Rule 404(b) similar acts evidence in antitrust conspiracy cases because it is probative of a defendant's intent to knowingly engage in the conspiracy at issue. *See, e.g., United States v. Sw. Bus Sales, Inc.*, 20 F.3d 1449, 1456 (8th Cir. 1994) (Rule 404(b) evidence is "admissible and relevant to the issue of intent to

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[5] "Smith's defense is that there never was an agreement or any exchange of bid numbers between Rains and himself. Thus, the 404(b) theories of knowledge and/or intent have no bearing on this case." Def. Smith Resp. Docket # 92 ¶ 20.

conspire, motive, and lack of mistake"); *United States v. Misle Bus & Equip.*, 967 F.2d 1227, 1234 (8th Cir. 1992) (district court acted within its discretion in admitting Rule 404(b) evidence when the "central issue at trial was whether [defendants] possessed the requisite intent to engage in the conspiracy"); *United States v. Dynalectric Co.*, 859 F.2d 1559, 1581-82 (11th Cir. 1988) (other bid rigging attempts admissible to show defendants' intent); *United States v. Bi-Co Pavers, Inc.*, 741 F.2d 730, 736-37 (5th Cir. 1984) (evidence of other bid rigging attempts admissible under Rule 404(b) to show intent and whether the individual defendant acted within the corporation's authority).

II. The 404(b) Evidence Identified in United States' Notice Docket #83 is Relevant, Probative, Not Unduly Prejudicial and Properly Admissible

A. Evidence Regarding Bids

Three of the matters identified in the United States' Notice Docket #83 relate to instances where Defendant Smith discussed bid information with a competitor prior to the time that bids were submitted and either reached, or attempted to reach, an understanding as to which company's bid would be lower and which company's bid would be higher. These instances meet the *Huddleston* standard for admissibility: they are similar[6] to the bid rigging charged in the Indictment; highly relevant regarding Defendants' intent, knowledge and absence of mistake or accident in entering into the conspiracy charged in the Indictment; and not unduly prejudicial.

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[6] "[A]lthough the uncharged crime must be similar to the charged offense, it need not be identical." *Zamora*, 222 F.3d at 762. "Similarity may be demonstrated through 'physical similarity of the acts or through the 'defendant's indulging himself in the same state of mind in the perpetration of both the extrinsic offense and the charged offenses.'" *Mares*, 441 F.3d at 1157 (citations omitted).

The first instance relates to a call from Defendant Smith to his coconspirator in the charged conspiracy, Kenneth Rains ("Rains"), contemporaneous with the conspiracy, wherein Smith told Rains he was not interested in winning an upcoming bid, and gave Rains B&H's bid number for the project. This was an invitation from Smith to Rains to agree that -- as between Smith's company, B&H, and Rains' company, Flint -- Flint would be the low bidder for the project and B&H would submit a higher, complementary bid.

The second instance relates to a call from Defendant Smith to his friend, Sean Renfro ("Renfro"), Division Manager of Sunland Construction, Inc., a competitor of Smith's and B&H's, wherein Smith, contemporaneous to the charged conspiracy, asked Renfro to send him a copy of the bid that Sunland was going to submit for an upcoming project. Defendant Smith proffered that Smith "asked Renfro to give him, Smith, a bid number that Smith could exceed by a reasonable amount so that B&H would not get the bid . . . "[7] Renfro sent Smith his bid, and Smith thereafter submitted a higher bid to the customer. As evidenced by Defendant Smith's own words, there was an understanding between Smith and Renfro that Smith's company would submit a bid higher than that of Renfro's company for the project in question.

This instance is also relevant 404(b) evidence as to Defendant Martin's intent, knowledge, and lack of mistake or accident. Once Defendant Smith received the bid information from Renfro, he forwarded that information on to Martin, a B&H employee whose job included the submission of B&H's bids for pipeline construction projects. The evidence will show that during

[7] Def. Smith Resp. Docket # 92 ¶ 13.

the charged conspiracy, when Smith needed to provide B&H's bid prices for the five bids rigged in September 2005 to his coconspirator Rains, he told Rains to call Martin who had the numbers. The 404(b) evidence and the charged conspiracy share a similar *modus operandi* in which Smith enlisted and relied on Martin when it came to the details of bids being submitted to customers and shared with competitors.

The third instance relates to yet another occasion when Defendant Smith attempted to reach an agreement with a competitor, this time Rocky de Herrera, about who would submit the higher bid and who would submit the lower bid for a pair of projects out for bid.[8]

Among the means and methods of forming and carrying out the conspiracy charged in the Indictment are the following:

a. Discussing among themselves the prospective submission of bids for pipeline construction projects;

b. Allocating pipeline construction projects among themselves;

c. Designating which coconspirator would submit the low bid for the project and which conconspirator would submit a higher, complementary bid for the project.

Indictment, Docket # 1 ¶ 3. The three instances where Defendant Smith discussed bid information with a competitor prior to the time that bids were submitted and either reached, or attempted to reach, an understanding as to which company's bid would be lower and which company's bid would be higher are highly relevant to Defendants' intent, knowledge and absence

[8] Defendant Smith concedes that this is an example of an occasion where he discussed bid information with a competitor prior to the time that bids were submitted and attempted to reach an understanding as to which company's bid would be lower and which company's bid would be higher. Def. Smith Resp. Docket # 92 ¶ 15.

of mistake or accident in entering into the conspiracy charged in the Indictment and should be admitted into evidence pursuant to Federal Rule of Evidence 404(b).

B. Evidence of Defendant Smith's False Statements to the FBI is Admissible as 404(b) Evidence of Intent, Knowledge of Guilt, and Absence of Mistake as to the Conspiracy Charged in Count One of the Indictment

The false statements that Defendant Smith made to the FBI agent who interviewed him on January 11, 2006, are admissible as 404(b) evidence of Defendant Smith's knowledge of his own guilt and his intent as regards the bid rigging conspiracy charged in Count One of the Indictment. Intent is always an issue in a bid rigging conspiracy case. *See* Section I.B., above. Because these statements are relevant 404(b) evidence as to Count One, they should be admitted as such, in addition to being admitted as intrinsic evidence as to Count Two of the Indictment.

Defendant Smith and the United States agree that Smith's statements are relevant and admissible as to Count Two of the Indictment. *See* "Defendant J.P. Smith's Response to United States' Motion for Pretrial Ruling on Admissibility of Testimony About Defendant Jon Paul Smith's False Statements to the FBI [Docket # 80]" (Docket # 101 ¶ 5). The question is therefore the admissibility of Smith's false statements as to Count One of the Indictment.

The position of the United States is that Smith's statements were false. Defendant Smith's position is that his statements to the FBI were true. Pursuant to *Huddleston* the Court is not required to make a preliminary determination of Defendant Smith's guilt or of the truth or falsity of his statements to the FBI. Rather, since Defendant Smith's false statements to the FBI are relevant, offered for a proper purpose, and probative, those statements are admissible pursuant to

Rule 404(b). By the time that the United States elicits testimony regarding Defendant Smith's false statements to the FBI agent, the jury will have heard more than enough evidence to meet the *Huddleston* standards. Once the evidence of Defendant Smith's false statements is admitted, it will be up to the jury "to weigh the testimony and the evidence and determine whether the false exculpatory evidence indicated a consciousness of guilt or nothing at all." *United States v. Zang*, 703 F.2d 1186, 1191 (10th Cir. 1982).

III. Conclusion

For the reasons set forth above, the proffered evidence is relevant to the element of intent to enter into the charged bid rigging conspiracy. It is probative evidence showing intent, guilty knowledge, plan, and absence of mistake or accident. It is not unduly prejudicial, and presentation of the evidence will not add significantly to the length of the trial. Admission of the proffered evidence is consistent with Tenth Circuit precedent and will assist the jury in properly determining the guilt or innocence of the Defendants.

Respectfully Submitted,

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Defendants.

CERTIFICATE OF SERVICE

I hereby certify that on November 1, 2007, I electronically filed the foregoing "United States' Reply in Support of 'United States' Notice of Intent to Use Evidence of Other Crimes, Wrongs or Acts Pursuant to Federal Rule of Evidence 404(b)' (Docket # 83)" with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

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I hereby certify that I have mailed or served the document or paper to the following non CM/ECF participants in the manner indicated by the non-participant's name:

None.

Respectfully Submitted,

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